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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

ZACKERY PRUNTY,

Defendant and Appellant.

C071065

(Super. Ct. No. 10F07981)

Confronted by a person he perceived to be a rival Sureño gang member, defendant Zackery Prunty, an admitted Norteño gang member, pulled a gun and fired six shots, striking and injuring his perceived rival and another person. A jury found defendant guilty of attempted voluntary manslaughter as a lesser included offense of attempted murder and of assault with a firearm and found true various enhancement allegations,

including criminal street gang enhancement allegations under Penal Code<sup>1</sup> section 186.22, also known as the Street Terrorism Enforcement and Prevention Act (the STEP Act).

On appeal, defendant contends: (1) there was insufficient evidence the Norteños qualified as a criminal street gang for purposes of the STEP Act; and (2) his trial attorney provided ineffective assistance of counsel because the attorney failed to request an instruction telling the jury it could consider defendant's voluntary intoxication in determining whether he had the specific intent necessary for attempted murder and attempted voluntary manslaughter.

Originally, we rejected both of defendant's arguments and affirmed the judgment against him. On review, however, the California Supreme Court concluded that "the prosecution did not introduce sufficient evidence showing a connection among the subsets it alleged comprised a criminal street gang, so Prunty was not eligible for a sentence enhancement under the STEP Act." (*People v. Prunty* (2015) 62 Cal.4th 59, 68.) Accordingly, the Supreme Court reversed our judgment as to defendant's sentence and remanded for further proceedings consistent with its opinion. (*Id.* at p. 85.)

On remand, we once again reject defendant's ineffective assistance of counsel claim because, on the facts here, defense counsel could have reasonably determined that requesting an instruction on voluntary intoxication would have been fruitless. Based on our Supreme Court's decision,<sup>2</sup> however, we must agree with defendant that there was insufficient evidence the Norteños qualified as a criminal street gang for purposes of the STEP Act. Thus, the enhancements imposed under the STEP Act cannot stand, and we will modify defendant's sentence accordingly by striking those enhancements. In

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<sup>1</sup> All further section references are to the Penal Code unless otherwise noted.

<sup>2</sup> See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.

addition, however, because the trial court stayed a three-year sentence on a separate great bodily injury enhancement only because of the enhanced sentence the court was imposing on the manslaughter charge under the STEP Act, and the STEP Act enhancements must now be stricken, we will also modify defendant's sentence by lifting the stay on that great bodily injury enhancement.

#### FACTUAL AND PROCEDURAL BACKGROUND

One evening in November 2010, Gustavo Manzo went to a restaurant in midtown Sacramento with his girlfriend and her little brothers to get something to eat. He was wearing an L.A. Dodgers cap. As they were walking up to the restaurant, two guys approached them and "started talking like mess." One of the guys, later identified as defendant, was wearing a red checkered jacket. He asked Manzo where Manzo was from and said, "fuck a Skrap, 916." Skrap is a derogatory term Norteño gang members use for Sureño gang members. In return, Manzo called defendant a "Buster" -- a derogatory term for a Norteño gang member. Defendant's companion, later identified as Emilio Chacon, tried to get defendant to leave, but defendant kept saying, "this is Norte, fuck a Skrap, 916." As defendant and Chacon eventually started backing away, Manzo took a couple of steps toward them. Defendant drew a gun and fired six times. Manzo tried to run but was struck in the buttocks with a bullet. One of Manzo's girlfriend's brothers, Santiago Aguilar, was hit in the leg.

Defendant was charged with the attempted murder of Manzo and assault with a firearm on Aguilar. Various enhancements were also charged, including criminal street gang enhancements under section 186.22, subdivision (b)(1). At trial, the People's gang expert testified that both defendant and Chacon were Norteño gang members and that the shooting would benefit the Norteños by making them look stronger. Defendant's theory at trial was that he acted in self-defense.

The jury found defendant guilty of attempted voluntary manslaughter as a lesser included offense of attempted murder and of assault with a firearm. In connection with

the manslaughter charge, the jury found defendant personally used a firearm and personally inflicted great bodily injury on Manzo and Aguilar. The jury also found the predicate facts for a criminal street gang enhancement under the STEP Act. In connection with the assault charge, the jury found defendant personally used a firearm and personally inflicted great bodily injury on Aguilar. Again, the jury also found the predicate facts for a criminal street gang enhancement under the STEP Act.

The trial court sentenced defendant to an aggregate prison term of 32 years, as follows: three years for the manslaughter charge, 10 years consecutive for personally using a firearm in the commission of that crime; 10 years consecutive for the gang enhancement on that crime; one year for the assault charge; three years and four months consecutive for personally using a firearm in the commission of that crime; one year and eight months consecutive for the gang enhancement on that crime; and three years consecutive for personally inflicting great bodily injury on Aguilar in the commission of that crime.<sup>3</sup> As for the great bodily injury enhancements on the manslaughter charge, the trial court “stayed” the “time” on the enhancement for the injury to Manzo “in that [the court was] considering the great bodily injury as it relates to the gang enhancement” and “stayed” the “time” on the enhancement for the injury to Aguilar “pursuant to Penal Code Section 654, because [the court was] considering” that great bodily injury in connection with the assault charge.

Defendant timely appealed.

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<sup>3</sup> The original abstract of judgment erroneously showed an aggregate sentence of only 30 years and eight months because it wrongfully attributed a three-year and four-month term to the gang enhancement on the assault charge (instead of the one-year and eight-month term the court actually imposed) and also wrongfully showed a stayed term on the great bodily injury enhancement on the assault charge (instead of the three-year unstayed term the court actually imposed). Of course, that error is moot now, given that the modified sentence resulting from this opinion will require a new abstract of judgment.

## DISCUSSION

### I

#### *Ineffective Assistance Of Counsel*

Defendant contends his trial attorney provided ineffective assistance of counsel because there was evidence defendant was drunk when he committed the shooting but his attorney did not request an instruction on how the jury could consider defendant's voluntary intoxication in determining whether he had the specific intent required for attempted murder or attempted voluntary manslaughter. We find no merit in this argument.

"To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) When "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged," "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal." (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

Citing *In re Cordero* (1988) 46 Cal.3d 161, 189, defendant first asserts that "effective assistance includes a duty to prepare and request all instructions applicable to the case." In effect, defendant suggests that because a voluntary intoxication instruction would have been applicable here, his trial attorney rendered ineffective assistance by failing to prepare and request such an instruction. But *Cordero* held no such thing. What the court in *Cordero* held was that "[a]dequate representation requires an attorney to research 'carefully all defenses of . . . law that may be available to the defendant,' " and "counsel's duty 'includes careful preparation of and request for all instructions which in his judgment are necessary to explain all of the legal theories upon which his defense

rests.’ ” (*Ibid.*) Contrary to defendant’s suggestion, ineffective assistance of counsel cannot be proven under *Cordero* merely by showing that trial counsel failed to prepare and request an instruction that was potentially applicable to the case.

Defendant next cites *People v. Frierson* (1985) 39 Cal.3d 803 for the principle that “defense counsel cannot decline to present the defendant’s only viable guilt defense for the purpose of saving it for the penalty phase.” Like *Cordero*, however, defendant misreads *Frierson* and misapplies it to this case. The court in *Frierson* made clear that “[t]he principal issue presented [there wa]s whether a defense counsel’s traditional power to control the conduct of a case includes the authority to withhold the presentation of *any* defense at the guilt/special circumstance stage of a capital case, *in the face of a defendant’s openly expressed desire to present a defense at that stage* and despite the existence of some credible evidence to support the defense.” (*Frierson*, at p. 812, italics added.) Indeed, the court “emphasize[d] that [its] holding rest[ed] on the fact that the record in th[e] case expressly reflect[ed] a conflict between defendant and counsel over whether a defense was to be presented at the guilt/special circumstance stage.” (*Id.* at p. 818, fn. 8.) No such thing happened here. Trial counsel did, in fact, present a defense for defendant -- self-defense -- and defendant points to no evidence that he openly expressed a desire to take a different tack by relying on voluntary intoxication instead of (or in addition to) self-defense. *Frierson* simply has no application here.

As we have indicated, as long as trial counsel could have had *some* satisfactory explanation for the conduct complained of, a claim of ineffective assistance must be rejected on direct appeal. (*People v. Pope, supra*, 23 Cal.3d at p. 426.) On the record here, we conclude that defendant’s trial attorney could have reasonably determined that requesting an instruction on voluntary intoxication would have been fruitless. Accordingly, the failure to request such an instruction did not amount to ineffective assistance of counsel.

The principles of law involved here are straightforward. “Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.” (Pen. Code, § 29.4, subd. (a) [formerly § 22].) “Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.” (*Id.*, subd. (b).) However, “[a] defendant is entitled to such an instruction only when there is substantial evidence of the defendant’s voluntary intoxication and the intoxication affected the defendant’s ‘actual formation of specific intent.’ ” (*People v. Williams* (1997) 16 Cal.4th 635, 677.)

In *Williams*, the defendant requested an instruction on voluntary intoxication as a defense to homicide based solely on a witness’s testimony that the defendant was “ ‘probably spaced out’ on the morning of the killings.” (*People v. Williams, supra*, 16 Cal.4th at p. 677.) The trial court refused to give the requested instruction. (*Ibid.*) On review, the defendant contended the trial court erred in refusing to give the instruction, and he sought “to bolster that argument by pointing to comments he had made in the recorded interview with police that around the time of the killings he was ‘doped up’ and ‘smokin’ pretty tough then.’ ” (*Ibid.*) The Supreme Court rejected the defendant’s argument, stating as follows: “Even if we consider all three of these statements, there was no error. Assuming this scant evidence of defendant’s voluntary intoxication would qualify as ‘substantial,’ there was no evidence at all that voluntary intoxication had any effect on defendant’s ability to formulate intent.” (*Id.* at pp. 677-678.)

The same conclusion applies here. As in *Williams*, the evidence of intoxication here was scant. In fact, the only such evidence was defendant’s statement to police that he was “drunk already” on brandy, from a bottle he had stolen earlier in the evening in South Sacramento and had drunk with a couple of other people, when he headed

downtown with Chacon to steal another bottle. There was no evidence of exactly how much alcohol defendant had actually consumed, over what period he had consumed it, or just how drunk he was at the time of the shooting. Furthermore, just as in *Williams*, there was no evidence that defendant's voluntary intoxication had any effect on his ability to formulate intent. To the contrary, by his own admission in his statement to police, despite his consumption of some unknown portion of the original bottle of brandy, defendant nonetheless managed to formulate the intent to "go steal [another] bottle from Safeway." If he could form the intent to steal another bottle despite his earlier alcohol consumption, there would have been no rational basis for the jury to conclude that he could not also have formed the intent to kill required for attempted murder or attempted voluntary manslaughter. Under these circumstances, defendant's trial attorney could have reasonably determined that the trial court would have refused to give a voluntary intoxication instruction, and that the jury would not have been persuaded by such an instruction in any event. Further, it would have diluted his argument that his actions were taken in self-defense. Accordingly, the failure to request such an instruction did not amount to ineffective assistance of counsel.

## II

### *Evidence Of A Criminal Street Gang*

Subdivision (b) of section 186.22 provides an additional term of imprisonment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." For purposes of this enhancement, a " 'criminal street gang' " is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [the statute], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang

activity.” (§ 186.22, subd. (f).) A “ ‘pattern of criminal gang activity’ ” is “the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [certain] offenses [identified in the statute], provided at least one of these offenses occurred after the effective date of [the law] and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons.” (*Id.*, subd. (e).)

The People sought to prove the gang enhancement allegations here by showing “that there is a criminal street gang known as the Norteños, who have three or more members, who have a common name, sign or identifying symbol, and whose primary criminal activities are the commission of [certain] crimes.” On appeal, however, defendant contends there was insufficient evidence to prove that the Norteños *as a whole* constitute a criminal street gang within the meaning of section 186.22. Defendant argues that this is so “because [the People] failed to provide substantial evidence of any collaborative effort among the various Norteño subsets” and the People “treated all Norteño subsets as fungible goods, without providing any substantial evidence that such treatment was warranted.” Stated another way, defendant contends the People wrongfully “conflat[ed] multiple gangs into one.”

In our original opinion, we rejected defendant’s argument, but on review the Supreme Court agreed with him and accordingly reversed our judgment as to defendant’s sentence. (*People v. Prunty, supra*, 62 Cal.4th at p. 85.) In the Supreme Court’s view, “Prunty was not eligible for a sentence enhancement under the STEP Act” (*id.* at p. 68) because there was insufficient evidence that the Norteños qualified as a criminal street gang, and therefore the additional terms of imprisonment imposed on defendant for the enhancements under the STEP Act (10 years as to the manslaughter charge and one year and eight months as to the assault charge) must be stricken. As we have noted, however, in addition to imposing an additional 11 years and eight months of imprisonment under

the STEP Act (which must now be stricken), the court “stayed” the “time” for the enhancement on the manslaughter charge for personally causing great bodily injury to Manzo because the court was “considering [that] injury as it relates to the gang enhancement.” In other words, the court imposed the three-year sentence for that great bodily injury enhancement<sup>4</sup> but stayed the execution of that sentence because the court was already imposing a 10-year sentence on defendant for the gang enhancement on the manslaughter charge. Because we must now strike that gang enhancement, the reason for the stay on the great bodily injury enhancement for the injury to Manzo no longer exists, and therefore we will modify defendant’s sentence to lift that stay. Thus, defendant’s sentence will now be an aggregate of 23 years and four months in prison, consisting of the following elements: three years for the manslaughter charge, 10 years consecutive for personally using a firearm in the commission of that crime; three years consecutive for personally inflicting great bodily injury on Manzo in the commission of that crime; one year for the assault charge; three years and four months consecutive for personally using a firearm in the commission of that crime; and three years consecutive for personally inflicting great bodily injury on Aguilar in the commission of that crime. In addition, the stayed three-year term for the great bodily injury enhancement on the manslaughter charge pertaining to the injury to Aguilar remains unchanged.

#### DISPOSITION

Defendant’s sentence is modified by striking both of the enhancements under the STEP Act and by lifting the stay on the three-year sentence for the great bodily injury enhancement on the manslaughter charge pertaining to the injury to Manzo. As

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<sup>4</sup> The great bodily injury enhancement was pursuant to Penal Code section 12022.7, subdivision (a), which provides “[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.”

modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward that amended abstract to the Department of Corrections and Rehabilitation.

/s/  
Robie, Acting P. J.

We concur:

/s/  
Butz, J.

/s/  
Duarte, J.